JOHN F. DAVIS, CLERK

No. 996

In the

Supreme Court of the United States

OCTOBER TERM, 1966

BROWNWOOD MANUFACTURING COMPANY
and
GILLSAM MANUFACTURING COMPANY, INC.,
Petitioners,

v.

TANENBAUM TEXTILE COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

HAROLD B. BERMAN,
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

BROWNWOOD MANUFACTURING COMPANY and GILLSAM MANUFACTURING COMPANY, INC., Petitioners, pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, Texas, entered in the above-entitled case. Petitioners' application for a writ of error to the Supreme Court of Texas, to review said judgment of the Court of Civil Appeals, was refused on October

5, 1966, and a motion for a rehearing on said application was overruled on November 2, 1966. Petitioners have exhausted all appeals available to them in the Texas Courts.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District in Dallas, Texas, printed in Appendix A hereto, *infra*, pp. A-1 to A-8, is reported in 404 S.W. 2nd 106. The Supreme Court of Texas, in refusing the Petitioners' application for a writ of error, did not render an opinion, but refused the same with the notation "Refused, No Reversible Error".

JURISDICTION

The judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, Texas, was rendered on May 20, 1966. R. Sec. C, p. 1; Appendix A, *infra*. Petitioners' motion for a rehearing in said Court was overruled on June 17, 1966. R. Sec. D, p. 27. An application for a writ of error was filed with the Supreme Court of Texas and was refused on October 5, 1966. R. Sec. E, p. 48. A motion for rehearing in the Supreme Court of Texas was overruled on November 2, 1966. R. Sec. E, p. 48. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257(3), because the Petitioners have been deprived of a right to due process claimed under the Constitution of the United States.

QUESTION PRESENTED

Is the guarantee of the Fourteenth Amendment, providing for the protection of due process of law, violated by the rendition of a judgment *in personam* against non-resident corporate defendants upon whom no personal service, actual or constructive (as provided by law), had been made, other than service upon an unauthorized agent, and then in such a manner which did not provide said non-resident corporate defendants adequate notice of the suit or sufficient time to prepare defenses and appear?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is Section 1 of the Fourteenth Amendment to the Constitution of the United States, which is as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The "due process" clause of said amendment is the portion thereof which is concerned with this petition.

STATEMENT AND HOW FEDERAL QUESTION WAS PRESENTED

Respondent initiated a cause of action in the 160th Judicial District Court of Dallas County, Texas, on July 17, 1964,

alleging that it had acquired a judgment *in personam* against the Petitioners on April 23, 1964, in the Supreme Court of the State of New York, in and for the County of New York. R. Sec. A, p. 35. The judgment alleged to have been obtained against the Petitioner Brownwood Manufacturing Company was in the sum of $39,897.49, and the judgment against the Petitioner Gillsam Manufacturing Company, Inc., was alleged to be in the sum of $40,562.12. R. Sec. A, p. 36. Both Petitioners filed their answer to this petition, denying the allegations generally, and further presenting to the trial court, by special exception to the allegations of Respondent's petition, the deprivation of the Petitioners' guaranteed right of due process in the exercise of the jurisdiction over them by the New York court. R. Sec. A, p. 54 and p. 67. The language of the special exception is found in Appendix B, p. B-1.

Subsequently, the Respondent filed a Motion for a Summary Judgment, pursuant to Rule 166-A, Texas Rules of Civil Procedure, attaching exemplified copies of the proceedings in the Supreme Court of New York, (R. Sec. B, p. 2) and requesting judgment by the Texas Court based upon the judgment secured in the New York Court. R. Sec. A, pp. 17-19. The Petitioners' answers to said motion again challenged the jurisdiction of the New York Court by reason of the violation of their Constitutional rights under the Fourteenth Amendment as to due process. R. Sec. A, p. 24, p. 29; Appendix B. p. B-1. The Petitioners attached affidavits of their principal officers to their answers to the Respondent's Motion for a Summary Judgment specifically denying the

authority of anyone to accept service for them in the State of New York, denying the existence of any agent in the State of New York upon which personal service could be made, and further denying that they had any opportunity to appear or prepare their defenses for the suit in New York, since they had no notice of the proceeding therein. R. Sec. A, pp. 25-27 and pp. 30-32; Appendix B, pp. B-2 to B-7. The record does not indicate that any service whatsoever was made on the New York judgment, other than service upon an attorney who formerly represented the Petitioners in New York in an arbitration proceeding. Respondent alleged that notice was given to the attorney of the Petitioners pursuant to Rule 2103(b) and Section 7506(d), New York Civil Practice Law and Rules, (R. Sec. A, p. 21) which read as alleged by said Respondent as follows:

> "*Rule 2103. Service of Papers.*
> "* * *
>
> "(b) *Upon an Attorney.* Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon his attorney * * *"
>
> "*S 7506. Hearing.*
>
> "(d) *Representation by Attorney* * * * If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney."

The record does not reflect any service whatsoever made upon any agent of the Petitioners nor on any agent designated by statute of the State of New York, and that the only service made in the New York proceeding was upon a

former attorney of the non-resident corporate Petitioners, who subsequently, without authority, made an appearance in said cause. Appendix B, pp. B-2 to B-7, affidavits of executive officers of Petitioners.

The trial court sustained the Respondent's Motion for a Summary Judgment based upon the validity of the judgment rendered in the State of New York, and not on any other grounds. The trial court in its judgment stated that in its opinion the judgment of the Supreme Court of the State of New York rendered on May 18, 1964, was entitled to full faith and credit under the laws of the State of Texas. R. Sec. A, pp. 80-81; Appendix B, pp. B-8 to B-9. The effect of the trial court's holding on this Motion for Summary Judgment, accepting the affidavits submitted by Petitioners as true (as it must do [see Reasons for Granting the Writ]) was that the New York judgment was valid by reason of personal service upon an unauthorized attorney for the non-resident corporate Petitioners, even though the Petitioners had no notice whatsoever of the litigation in New York until such time the proper agents of the corporations were served with citation in the State of Texas. R. Sec. A, p. 27, p. 32; Appendix B, pp. B-2 to B-7.

Petitioners perfected their appeal to the Court of Civil Appeals of the State of Texas, Fifth Supreme Judicial District, sitting at Dallas, Texas, which is the intermediate court of appeals in the State of Texas. R. Sec. A, p. 82, p. 88. The opinion of this Court (Appendix A, p. A-7 disposed

of the due process defense of the Petitioners in the following manner:

> "We do not think due process has been denied appellants (Petitioners) in this case. After voluntarily submitting themselves to the New York laws and the jurisdiction of its courts, not only by their written contracts but by invoking the jurisdiction of the very court whose judgment they now say is void, and after notice of the motion to confirm and for a judgment was served upon their attorney and they were informed of this fact and of their attorney's opposition thereto, they remained silent and let the hearing of the motion be held without further protest or objection, apparently willing to accept the benefits if the efforts of Mr. Lazarus were successful, but now say that they are not bound by the unfavorable result. This the law does not permit them to do."

It might be noted that the Court of Civil Appeals, in its opinion, ignored the disputed issues of fact concerning the authority of the attorney upon whom service was made to further represent the Petitioners, after the completion of the arbitration proceeding, in any other proceeding in New York State.

An application to the Supreme Court of Texas for a writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas was filed by the Petitioners. R. Sec. E, pp. 1-18. Two of the Points of Error presented to the Supreme Court of Texas were:

> "POINT OF ERROR NUMBER SIX.
>
> "THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT DUE PROCESS HAD NOT BEEN DENIED PETITIONERS.

"POINT OF ERROR NUMBER SEVEN.

"THE COURT OF CIVIL APPEALS ERRED IN DENYING TO PETITIONERS THEIR RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES." (R. Sec. E, p. 8)

The Supreme Court of Texas, without written opinion, refused the same with the notation "Refused, No Reversible Error". R. Sec. E, p. 48. Petitioners' motion for rehearing was overruled. R. Sec. E, p. 48.

REASONS FOR GRANTING THE WRIT

The judgments of the courts below have further eroded the safeguards of jurisdictional due process established by this Court in the famous case of *Pennoyer v. Neff*, 95 U.S. 714, 24 L. ed. 565 (1877). The effect of the decisions below is to render a non-resident corporate defendant, who has not submitted itself to the jurisdiction of a forum, bound by a personal judgment rendered by that forum without any notice, actual or constructive, of the proceedings of the forum.

This Court has carefully defined and expanded the principles of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States. In the *Pennoyer* case, *ibid*, it was established that (1) a personal judgment can not be rendered by a court without personal jurisdiction; (2) a personal judgment can not be rendered against a non-resident defendant merely because said defendant owns property within the jurisdiction of the forum; and (3) personal jurisdiction can not be obtained against a

non-resident defendant by serving process outside the forum or by publication. This Court in the years to follow has continued to adjust the concepts of the *Pennoyer* case, *ibid*, to the process of evolution experienced by our society, but has always jealously guarded the protection of due process guaranteed by the Constitution.

In *International Shoe Company v. Washington*, 326 U.S. 310, 90 L. ed. 95, 66 S. Ct. 154 (1945), the Court pronounced that "Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S., 316. Even though expanding the concept of due process, the Court has continued to recognize the rights of a non-resident corporate defendant to be protected from personal judgments of a forum in which these "minimum contacts" not offensive to "traditional notions of fair play and substantial justice" did not exist. See *Hanson v. Denckla*, 357 U.S. 235, 2 L. ed. 2nd 1283, 78 S. Ct. 1228 (1958).

The lower state courts in this case at bar have allowed the lower courts of the State of New York to take a personal judgment against the Petitioners not only under circumstances beyond the boundary lines of the principle of the *International Shoe* case, *infra*, but to take one further step which this Court has inferred, but has not as yet ruled upon, would be in violation of the due process clause of the Fourteenth Amendment. This Court in *McGee v. International*

Life Insurance Company, 355 U.S. 220, 2 L. ed. 2nd 223, 78 S. Ct. 199 (1957), alluded to the fact, though no such contention was made in that case, that due process requires not only the "minimum contacts" of the *International Shoe* case, *infra*, but also adequate notice to the non-resident defendant. A personal judgment was rendered against the Petitioners, non-resident corporations of the forum in which said judgment was rendered, in spite of their contentions that they were not served pursuant to any applicable state statute nor did they have adequate notice of the suit or sufficient time to prepare their defenses and appear.

This cause was decided by the state courts under summary judgment procedure provided by Texas Rules of Civil Procedure. Rule 166-A, Texas Rules of Civil Procedure. In the consideration of the Respondent's Motion for a Summary Judgment, the Supreme Court of Texas, the state court of last resort, has held that the facts asserted by the Petitioners in opposition to that motion must be accepted as true for the purposes of the consideration of that motion. *Gulbenkian v. Penn*, 151 T. 142, 252 S.W. 2nd 929 (1953). The facts concerning the jurisdiction of the New York lower court over a non-resident corporate defendant upon which the Texas Court rendered their decision concerning due process were those stated in affidavits of the principal officers of the Petitioners. Appendix B, pp. B-2 to B-7; R. Sec. A, pp. 25-27, pp. 30-32. Briefly, these facts may be summarized as to both Petitioners, as follows: (1) they were both Texas corporations; (2) the business of their companies was confined to Texas, doing no business in New York; (3) they both agreed

to participate in a common law arbitration procedure in the State of New York with the Respondent, a New York corporation; (4) they both retained a New York attorney to represent them in the common law arbitration proceeding only; (5) they authorized the attorney to institute a special proceeding in the New York Courts to consolidate the numerous common law arbitration proceedings pending, which special proceeding was completed; (6) they engaged in the said arbitration proceeding, presented their evidence therein, and retained a counsel to represent them therein; (7) after the completion of the arbitration proceedings, both Petitioners awaited proper and due notice of proceedings to enforce the award of the arbitration commission; (8) they received no notice whatsoever of any further proceedings on said award in New York until after a final judgment was rendered against them in New York, and they were served with process of a Texas court in which Respondent had initiated action on the New York judgment; and (9) the only service made by Respondent in the New York proceeding was on the attorney previously retained at the arbitration proceeding, and Respondent did not avail itself of any other non-resident personal service, constructive service, or publication service, by statute or otherwise, to give the Petitioners notice of the New York proceedings.

The lower courts have taken the position that the Petitioners have not been denied due process because service was had upon an attorney who formerly represented them in a common law arbitration proceeding, not a statutory arbitration as provided for in the New York law. Opinion of

Court of Civil Appeals, Appendix A, pp. A-1 to A-8; Judgment of District Court, Appendix B, pp. B-8 to B-9. The authority relied upon by the Respondent to make service upon the attorney was concerned with statutory arbitration in contrast to a common law arbitration. Appendix A, p. A-4. A common law arbitration, recognized in the State of New York, *Finucon v. Board of Education,* 190 N.Y. 76, is complete when an award is made, and to that point, no judicial proceeding has been undertaken. *Lummus Company v. Commonwealth,* 297 Fed. 2nd 80, cert. denied 7 L. ed. 524 (1961). An attorney retained to handle a non-judicial arbitration is not thereby designated as an agent for service in all subsequent proceedings initiated against the non-resident corporation. This is certainly the effect of the decisions of the state courts in this matter.

The minimum satisfaction of the due process clause must be defined as requiring a non-resident corporation to have a prior notice and an opportunity for a hearing *Mullane v. Central Hanover Trust Company,* 339 U.S. 306, 94 L. ed. 865, 70 S. Ct. 652 (1950); *Grannis v. Ordean,* 234 U.S. 385, 58 L. ed. 1363, 34 S. Ct. 779 (1914). Giving notice to a past representative who has no obligation to notify the real party in interest, and who did not so notify the real party in interest, is not the type of notice which the law requires to insure an opportunity for a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L. ed. 2nd 62, 66; 85 S. Ct. 1187 (1965).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Harold B. Berman

HAROLD B. BERMAN,
EMIL CORENBLETH,
Attorneys for Petitioners.
1831 Republic National
Bank Bldg.,
Dallas, Texas, 75201,

January 23, 1967.

PROOF OF SERVICE

I, Harold B. Berman, attorney for Brownwood Manufacturing Company and Gillsam Manufacturing Company, Inc., Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of January, 1967, I served copies of the foregoing petition for a writ of certiorari on Respondent thereto, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to the following attorney of record for Respondent:

G. H. Kelsoe, Jr., Esq.
620 Mercantile Dallas Building
Dallas, Texas

The person on whom service is to be made does not reside five hundred miles or more from me.

Harold B. Berman

Harold B. Berman,
Attorney for Petitioners.
1831 Republic National
Bank Bldg.,
Dallas, Texas, 75201,

APPENDIX A

OPINION OF COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT DALLAS

No. 16,729

BROWNWOOD MANUFACTURING COMPANY, et al.,
Appellants,

v.

TANENBAUM TEXTILE COMPANY, INC.,
Appellee.

From a District Court of Dallas County, Texas

Summary judgment was rendered in favor of appellee Tanenbaum Textile Company, Inc. against the appellants Brownwood Manufacturing Company and Gillsam Manufacturing Company, Inc. for $39,897.49 and $40,562.12, respectively. Appellee's suit against appellants was based on a judgment of the Supreme Court of the State of New York in and for New York County. The New York judgment was rendered in confirmation of certain awards made by a board of arbitration. Appellants say by their two points of error that the New York judgment is void and not binding on

them, and not entitled to full faith and credit in this Texas suit, because they were not served with process in the New York proceeding.

FACTS

Appellants manufactured clothing out of textiles supplied by appellee under written contracts, paragraph 16 of which provided:

> "ARBITRATION: Any controversy relating to this contract shall be settled by arbitration. Arbitration shall be held in the City of New York in accordance with the rules then obtaining of the General Arbitration Council of the Textile Industry. Buyer and Seller consent to the jurisdiction of the Supreme Court of the State of New York and further consent that any process or notice of motion or any application to the Court, including application for judgment upon an award, may be served outside the State of New York by registered mail or by personal service provided a reasonable time for appearance is allowed."

Disputes arose between the parties—appellee claiming the purchase price of certain materials, and appellants claiming damages on account of defective materials and tardy deliveries. Pursuant to the contracts, these claims were submitted to arbitration in New York City. The appellants were represented by a lawyer named Lazarus and appellee by a lawyer named Whyman, both of New York City.

As attorney for the appellants here, Lazarus first requested the Arbitration Council of the Textile Industry to consolidate and hear together the several claims, and on being informed that the Council was without power to do so except

by agreement, and Whyman having refused to agree to it, Lazarus then filed in the Supreme Court in and for New York County a motion to consolidate the claims. The expressed purpose of this motion was to save appellants the unnecessary expenditure of time and money in making numerous trips to New York with their witnesses for hearings on the separate claims. Appellants knew of this motion and approved of its filing. Appellee's attorney, Whyman, vigorously resisted the motion, but it was granted. Arbitrators heard the claims and made awards to appellee against the appellants for substantial amounts. In due time Whyman filed a motion in the same numbered proceeding in which Lazarus had previously filed his motion to consolidate, asking that the awards be confirmed and judgment rendered thereon. Notice of this motion was served on Lazarus as attorney of record for the appellants. Lazarus sent copies of the motion and of the awards to appellants. He then filed two affidavits in opposition to the motion to confirm and for judgment, and sent copies thereof to appellants. In those affidavits he described himself as attorney for appellants. Appellants gave him no specific instructions in the matter after the awards in arbitration were made; neither did they protest his having accepted service of the motion to confirm and for judgment or question his authority to enter their appearances thereto. The awards were confirmed and judgment rendered thereon by the Supreme Court; this being the judgment sued on in this case.

Pursuant to requests therefor made under Rule 184a, Vernon's Texas Rules of Civil Procedure, the trial court took

judicial notice of certain New York laws, the pertinent portions of which are as follows:

Article 75, of the Civil Practice Law and Rules (C.P.L.R.), relates to arbitrations. Section 7501 thereof reads:

> "A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. * * *"

The last sentence of Section 7506(d) is:

> "If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney."

Section 7510 reads:

> "The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in Section 7511."

Section 7514 provides in part:

> "*Sec. 7514. Judgment on an award.*
>
> "(a) Entry. A judgment shall be entered upon the confirmation of an award."

Rule 320, C.P.L.R., provides that the "defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer."

Rule 2103(b) provides that, except where otherwise prescribed by law or order of court, "papers to be served upon

a party in a pending action shall be served upon his attorney."

Appellants, on advice of their Texas attorney, took no active part in the New York proceedings after the awards were made and take the position here that Lazarus had no authority to enter an appearance for them in the New York court; that he was employed to represent them in the arbitration proceedings up to the making of the awards, and that thereafter he had no authority to act for them. Lazarus testified by deposition that in filing his affidavits in opposition to the motion to confirm and for judgment he thought in good faith that he was authorized to do so; that he was employed by appellants to represent them generally in the arbitration proceedings for an agreed flat fee; that he charged no additional fee for resisting the motion to confirm and for judgment because he considered it all a part of the work he was employed and paid to do.

OPINION

When appellants entered into these written contracts providing for arbitration in New York, they were charged with notice of the New York laws pertaining to arbitration and consented to be bound thereby. Appellants now say, however, that their consent was limited strictly to the matter of arbitration, and that when appellee's counsel filed the motion for confirmation of the awards and for judgment thereon this was the filing of a new suit, of which they were entitled to be notified by summons or citation served on them personally within the limits of the State of New York,

citing Pennoyer v. Neff, 95 U.S. 714, and that when the awards were made by the arbitration board the attorney-client relationship theretofore existing between them and Mr. Lazarus came to an end.

The above mentioned New York statutes, as well as the above quoted paragraph 16 of the contracts between the parties, specifically recognize that the application for judgment upon an award is a part of the arbitration proceeding. This is in harmony with the New York decisions. See Mossman v. Motor Vehicle Acc. Indemnification Corp., 244 N.Y.S. 2d 565, holding that the motion to confirm "finalizes the arbitration award and is therefore an integral part of the arbitration procedure necessary to protect the interests of the parties."

The New York cases seem to be uniform in holding that an agreement to arbitrate within a given jurisdiction is a submission to the law and courts of that jurisdiction and to any procedures in that jurisdiction necessary to bring the arbitration to an effective conclusion. Application of Liberty Country Wear, Inc., 96 N.Y.S. 2d 134.

See also Stanley J. Staklinski, Petitioner-Respondent, and Pyramid Electric Co., Respondent-Appellant, 180 N.Y.S. 2d 20, affirmed 188 N.Y.S. 2d 541, 160 N.E. 2d 78, wherein it was said:

> "There was an agreement to arbitrate in accordance with rules of the American Arbitration Association and, pursuant to such rules, New York was selected as the locale for the hearing. It constituted, in effect, a consent of the parties to the jurisdiction of the Supreme Court of this state to enforce such contract."

As held in Aarons v. Local 32-E, Building Service Employees International Union, 82 N.Y.S. 2d 262, in submitting to arbitration a party must be deemed to have put in a general appearance in a special proceeding and to have waived any question of jurisdiction.

Moreover, in our opinion appellants are also bound by the fact that their own attorney, while admittedly authorized to represent them, and with their knowledge and consent, invoked the jurisdiction of the New York court to compel appellee, over its vigorous protest, to consolidate its claims and try them in one proceeding. They are in no position now to deny the authority of that court to render an *in personam* judgment against them.

We do not think due process has been denied appellants in this case. After voluntarily submitting themselves to the New York laws and the jurisdiction of its courts, not only by their written contracts but by invoking the jurisdiction of the very court whose judgment they now say is void, and after notice of the motion to confirm and for judgment was served upon their attorney and they were informed of this fact and of their attorney's opposition thereto, they remained silent and let the hearing of the motion be held without further protest or objection, apparently willing to accept the benefits if the efforts of Mr. Lazarus were successful, but now say they are not bound by the unfavorable result. This the law does not permit them to do. Baughan v. Goodwin, Tex. Civ. App., 162 S.W. 2d 732, wr. ref. w.o.m.

Being of the opinion that the summary judgment was correct, we affirm it.

AFFIRMED.

.....

BATEMAN, *Associate Justice*

DELIVERED:

May 20, 1966.

APPENDIX B

Special exception in Answer of Petitioner Brownwood Manufacturing Company:

> E. That the Supreme Court of the State of New York acquired no jurisdiction over the person of this Defendant, and said Judgment is in violation of the 14th Amendment to the Constitution of the United States and has deprived Defendant of its due process of law. (R. Sec. A, p. 54)

Special exception in Answer of Petitioner Gillsam Manufacturing Company, Inc.:

> E. That the Supreme Court of the State of New York acquired no jurisdiction over the person of this Defendant, and said Judgment is in violation of the 14th Amendment to the Constitution of the United States and has deprived Defendant of its due process of law. (R. Sec. A, p. 67)

Petitioner Brownwood Manufacturing Company's Answer to Respondent's Motion for Summary Judgment:

> (6) That said judgment is in violation of the Fourteenth Amendment to the Constitution of the United States, and has deprived Defendant of its due process of law. (R. Sec. A, p. 24)

Petitioner Gillsam Manufacturing Company, Inc.'s Answer to Respondent's Motion for Summary Judgment:

> (6) That said judgment is in violation of the Fourteenth Amendment to the Constitution of the United States, and has deprived Defendant of its due process of law. (R. Sec. A, p. 29)

Affidavit of principal officer of Brownwood Manufacturing Company attached to Petitioner's Answer to Respondent's Motion for Summary Judgment:

No. 89,279-D/H
Tanenbaum Textile Co., Inc.
v.
Brownwood Manufacturing Co., et al.
In the 160th Judicial District Court of
Dallas County, Texas

Affidavit of Joseph Sidran

THE STATE OF TEXAS:
COUNTY OF DALLAS:

Before me, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared JOSEPH SIDRAN, who, after being duly sworn, stated on his oath as follows:

"My name is Joseph Sidran. I am a resident of Dallas County, Texas. I am President of Brownwood Mfg. Co. This Company is a Texas Corporation with principal office in Dallas County, Texas, and factory at Brownwood, Texas.

"Controversies arose between this Company and Tanenbaum Textile Co., Inc. on contracts for fabrics, and under the terms of the contracts, Tanenbaum Textile Co., Inc. requested arbitration before the General Arbitration Council of the Textile Industry. At the same time it also requested arbitration of a dispute with Gillsam Mfg. Co., Inc. and Sidran Sportswear, Inc. These are all separate and independent Texas Corporations. I had no financial interest in Gillsam Mfg. Co., Inc., owned no stock therein, and was not an officer or director thereof. Brownwood Mfg. Co. employed Lester A. Lazarus, a New York attorney, to represent it in such arbitration proceedings before such Arbitration Board. Since a number of contracts were involved, and since

he likewise represented Gillsam Mfg. Co., Inc. and Sidran Sportswear, Inc., and since it would have required many trips for separate hearings, he was authorized to request a consolidation of such claims insofar as having them all heard by one panel and in consecutive order. The Board said it had no authority to consolidate, and a petition was filed in the Supreme Court by Mr. Lazarus in a special proceeding in the nature of a motion to authorize such consolidation and a show cause order was served upon Tanenbaum Textile Co., Inc. The Court entered an order consolidating such cases, and no appeal was taken, and so far as I know this ended the special proceedings in that case.

"That all of the activities of Brownwood Mfg. Co. are confined to the State of Texas. It does not do business in New York. Merchandise manufactured by it is shipped into interstate commerce to various branches of the United States Government, with whom it contracts to manufacture certain garments. It also purchases from Texas raw materials from outside the State of Texas.

"Brownwood Mfg. Co. has no agent for service except in the State of Texas. It was never served with a citation in said suit in the Supreme Court of the State of New York, which said Court entered a judgment against it. That Brownwood Mfg. Co. never authorized Mr. Lazarus, or any other person, to accept service upon it in said suit. That Brownwood Mfg. Co. could not be served in said suit by serving the attorney representing it in the arbitration proceedings.

"It was my understanding that when the arbitration award was made by the Board suit for enforcement would be brought in Texas, where personal service could be had on the Company. I was informed by my counsel in Dallas, Emil Corenbleth, that service in a suit for a money judgment must be personal service and under Texas law, since the Company did no business in New York, and its offices were not in New York, and suit would be brought here in Texas.

"I did not authorize, nor did the Company or any of its officers or directors authorize, Mr. Lazarus to accept service in New York for the Company or file any motions or proceedings in said suit. I am not familiar with New York laws, nor why Mr. Lazarus was served.

"I believe the Company is entitled to its day in Court. When the Company was served in Texas in the above cause now in the 160th District Court, I learned of this judgment against the Company, which was entered without service on the Company. I understand that the cause number of the New York case is 16475/1963."

Signed this 12th day of February, A.D. 1965.

/s/ JOSEPH SIDRAN

Joseph Sidran

SUBSCRIBED AND SWORN TO BEFORE ME BY JOSEPH SIDRAN, This the 12th day of February, A.D. 1965, to certify which witness my hand and seal of office.

/s/ R. L. CROCKER

Notary Public, Dallas County, Texas

ENDORSEMENT ON INSTRUMENT

No. 89,279-D/H

Tanenbaum Textile Co., Inc. v. Brownwood Manufacturing Co., et al.

DEFENDANT BROWNWOOD MFG. CO.'S ANSWER TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT AND AFFIDAVIT OF JOSEPH SIDRAN

Filed: February 17, 1965

BILL SHAW, *District Clerk*

/s/ MCCORMICK, *Deputy*

Dallas County, Texas
(R. Sec. A, pp. 25-27)

Affidavit of principal officer of Gillsam Manufacturing Co., Inc.:

No. 89,279-D/H
Tanenbaum Textile Co., Inc.
v.
Brownwood Manufacturing Co., et al.
In the 160th Judicial District Court of
Dallas County, Texas

Affidavit of Sam E. Giller

THE STATE OF TEXAS:
COUNTY OF DALLAS:

Before me, the undersigned authority, a Notary Public in and for said County and State, on this day personally appeared SAM E. GILLER, who after being duly sworn, stated on his oath as follows:

"My name is Sam E. Giller. I am a resident of Dallas County, Texas. I am President of Gillsam Mfg. Co., Inc. This Company is a Texas Corporation with principal office in Dublin, Erath County, Texas.

"Controversies arose between this Company and Tanebaum Textile Co., Inc. on contracts for fabrics, and under the terms of the contracts Tanenbaum Textile Co., Inc. requested arbitration before the General Arbitration Council of the Textile Industry. At the same time it also requested arbitration of a dispute with Brownwood Mfg. Co. and Sidran Sportswear, Inc. These are all separate and independent Texas Corporations. I had no financial interest in Brownwood Mfg. Co. and Sidran Sportswear, Inc., owned no stock therein, and was not an officer or director thereof. Gillsam Mfg. Co., Inc. employed Lester A. Lazarus, a New York attorney, to represent it in such arbitration proceedings before such Arbitration Board. Since a number of contracts were involved, and since he likewise represented Brownwood Mfg. Co. and Sidran Sportswear, Inc., and since it would have required many trips for separate hearings, he was authorized to request a consolidation of such claims insofar as having all them all heard by

one panel and in consecutive order. The Board said it has no authority to consolidate, and a petition was filed in the Supreme Court by Mr. Lazarus in a special proceeding in the nature of a motion to authorize such consolidation and a show cause order was served upon Tanenbaum Textile Co., Inc. The Court entered an order consolidating such cases, and no appeal was taken, and so far as I know this ended the special proceedings in that case.

"That all of the activities of Gillsam Mfg. Co., Inc. are confined to the State of Texas. It does not do business in New York. Merchandise manufactured by it is shipped into interstate commerce to various branches of the United States Government, with whom it contracts to manufacture certain garments. It also purchases from Texas raw materials from outside the State of Texas.

"Gillsam Mfg. Co., Inc. has no agent for serivce except in the State of Texas. It was never served with a citation in said suit in the Supreme Court of the State of New York, which said Court entered a judgment against it. That Gillsam Mfg. Co., Inc. never authorized Mr. Lazarus, or any other person, to accept service upon it in said suit, That Gillsam Mfg. Co., Inc. could not be served in said suit by serving the attorney representing it in the arbitration proceedings.

"It was my understanding that when the arbitration award was made by the Board suit for enforcement would be brought in Texas, where personal service could be had on the Company. I was informed by my counsel in Dallas, Emil Corenbleth, that service in a suit for a money judgment must be personal service and under Texas law, since the Company did no business in New York, and its offices were not in New York, and suit would be brought here in Texas.

"I did not authorize, nor did the Company or any of its officers or directors authorize, Mr. Lazarus to accept service in New York for the Company or file any motions or proceedings in said suit. I am not famil-

iar with New York laws, nor why Mr. Lazarus was served.

"I believe the Company is entitled to its day in Court. When the Company was served in Texas in the above cause now in the 160th District Court, I learned of this judgment against the Company, which was entered without service on the Company. I understand that the cause number of the New York case is 16475/1963."

Signed this 12th day of February, A. D. 1965.

/s/ Sam E. Giller

Sam E. Giller

SUBSCRIBED AND SWORN TO BEFORE ME BY SAM E. GILLER, This the 12th day of February, A. D. 1965, to certify which witness my hand and seal of office.

/s/ Bette Rogers

NOTARY PUBLIC, DALLAS COUNTY, TEXAS

My commission expires: 6/1/65

BETTE ROGERS
111 Braniff Bldg.,
Dallas, Texas

ENDORSEMENT ON INSTRUMENT
No. 89,279-D/H

Tanenbaum Textile Co., Inc. vs. Brownwood Manufacturing Co., et al

DEFENDANT GILLSAM MFG. CO., INC.'S ANSWER TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT

Filed: February 17, 1965
Dallas County, Texas

BILL SHAW, District Clerk
/s/ McCormick, Deputy

(R. Sec. A, pp. 30-32)

Judgment of the 160th District Court, Dallas County, Texas, in Cause No. 89279-D/H:

BE IT REMEMBERED that on the 2nd day of September, 1965 there came on to be heard plaintiff's second motion for summary judgment, and the defendants, Brownwood Manufacturing Co. and Gillsam Manufacturing Co., Inc., having filed answers thereto and having made their appearances before the Court for all purposes, and the said plaintiff, appearing by and through its duly authorized attorney of record in this cause, viz. G. H. Kelsoe, Jr., and the defendants, appearing by and through their duly authorized attorney of record in this cause, viz. Emil Corenbleth, appeared in person and submitted said motion to the Court for its determination; and the Court, having expressly found that it was vested with jurisdiction of the parties and of the subject matter, thereupon took plaintiff's second motion for summary judgment under advisement for the purpose of studying the depositions, the exhibits, the affidavits, the transcript of proceedings in the lawsuit in the Supreme Court of the State of New York, the judgment of the Supreme Court of the State of New York rendered on May 18, 1964, and all other data and information duly filed in this cause, together with several notices and motions in accordance with Rule 184a to take Judicial notice of certain laws of the State of New York; and the Court, after considering the record in this cause, is of the opinion, that plaintiff's second motion for summary judgment should be granted, and that the judgment of the Supreme Court of the State of New York rendered on May 18, 1964, same being index number 16,475/1963, is entitled to full faith and credit under the laws of the State of Texas.

BE IT THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff, Tanenbaum Textile Co., Inc., do have and recover judgment of and from the defendant, Brownwood Manufacturing Co., for the sum of $39,897.49, plus legal interest at the

rate of six percent per annum, and that plaintiff do further have and recover judgment of and from the defendant, Gillsam Manufacturing Co., Inc. for the sum of $40,562.12, plus legal interest at the rate of six percent per annum.

BE IT FURTHER ORDERED, ADJUDGED AND DECREED that all costs of court shall be taxed one-half against the defendant Brownwood Manufacturing Co. and one-half against the defendant Gillsam Manufacturing Co., Inc., for all of which let execution and such other writs as are necessary to enforce this judgment in conformity with the law issue.

To which action of the Court the defendants, and each of them, Brownwood Manufacturing Co. and Gillsam Manufacturing Co., Inc., duly and timely excepted and gave notice of appeal to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, sitting at Dallas, Texas

Signed and rendered this 11th day of October, 1965.

/s/ Hoyet A. Armstrong

Judge

ENDORSEMENT ON INSTRUMENT NO. 89279-H
Tanenbaum Textile Co., Inc. vs. Brownwood Manufacturing, et al

FINAL JUDGMENT
Recorded: Volume R, Page 385
In the Minutes of the 160th Judicial District Court
(R. Sec. A, pp. 80-81)

FILED
FEB 10 1967
JOHN F. DAVIS, CLERK

No. 996

In the

Supreme Court of the United States

OCTOBER TERM, 1966

BROWNWOOD MANUFACTURING COMPANY
AND
GILLSAM MANUFACTURING COMPANY, INC.,
Petitioners,

v.

TANENBAUM TEXTILE COMPANY, INC.,
Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT

G. H. KELSOE, JR.,
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Attorneys for Respondent.

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No. 996

In the

Supreme Court of the United States

OCTOBER TERM, 1966

BROWNWOOD MANUFACTURING COMPANY
AND
GILLSAM MANUFACTURING COMPANY, INC.,
Petitioners,

v.

TANENBAUM TEXTILE COMPANY, INC.,
Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT

Respondent does not disagree with Petitioners' petition for writ of certiorari with respect to the Citations of Opinions Below or with the Jurisdiction section of said petition. In Respondent's view, however, Petitioners have seriously misdescribed the Question Presented which actually arose in the record of this proceeding and have not set forth in the Statement section the facts in sufficient detail which formed the basis of the Texas Courts' judgments below.

Under the law as applied to these facts, it is Respondent's position that the petition for writ of certiorari should be denied.

CONSTITUTION, STATUTES AND RULES OF PROCEDURE INVOLVED

The Constitutional provisions involved are the full faith and credit clause, Article IV, Section 1, of the Constitution of the United States and the due process clause, Section 1 of the Fourteenth Amendment to the Constitution of the United States, both of which are set forth in Appendix A, *infra*. Additionally, this case involves Sections 7501, 7502(a), 7506(d), 7510 and 7514(a) of Article 75 and Rules 320 and 2103(b), Civil Practice Laws and Rules, McKinney's Consolidated Laws of New York, regarding Arbitration and Civil Procedure which are set forth in Appendix A, *infra*.

QUESTION PRESENTED

Is the guarantee of due process under the Fourteenth Amendment to the Constitution violated, so that full faith and credit under Section 1, Article IV of the Constitution of the United States should not be given to the judgment of a sister state (New York), where the record indicates that petitioners consented to the jurisdiction of the courts of the sister state (New York) in contracts providing for arbitration, petitioners initiated and participated actively in arbitration proceedings in New York, petitioners first invoked the jurisdiction of the sister state's (New York) courts, petitioners were served in accordance with the

rules and laws of the sister state (New York), petitioners entered a general appearance in the New York proceeding and had full notice of the proceedings to confirm the award by service on an attorney of their choice?

STATEMENT OF THE CASE

Petitioners entered into contracts to purchase fabric from Respondent for manufacture of garments under contracts between Petitioners and the United States Government. Disputes arose between Respondent and Petitioners. Both Petitioners and Respondent sought arbitration of the matters and instituted proceedings for the arbitration of said disputes before the General Arbitration Council of the Textile Industry. Petitioners' counsel filed a Motion to Consolidate the proceedings before said Council which Respondent opposed. Thereafter, Petitioners, acting by and through their attorney, Lester A. Lazarus, of New York City, invoked the jurisdiction of the Supreme Court of New York, making application by order to show cause why said cases should not be consolidated and a request for stay pending the outcome of the application to consolidate, and for such other and further relief to which the Court should deem proper (R. Sec. B, Affidavit of Lazarus, attached to Order to Show Cause, 9th Document, New York Proceedings). The Supreme Court of New York granted a stay in the arbitration proceedings until the motion to consolidate could be decided, said order reciting due service thereof upon Martin N. Whyman, attorney for Respondent, Tanenbaum Textile Company, Inc. Respondent, through its attorney Whyman,

vigorously opposed said consolidation but the cases were consolidated by order of the Supreme Court of New York (Cause No. 16475/63). On April 13, 1964, the parties, their witnesses and counsel, attended the arbitration proceedings, proceeding to hearing on April 13, 14 and 15, 1964, on which dates the parties presented their testimony and proofs in their respective contentions. The arbitrators made six separate awards, each of which was unanimous, and each of which was delivered to the attorneys. Petitioners were provided with copies of the final awards issued by the arbitration council (R. Sec. B, Sidran dep., p. 15, line 17). Respondent moved for confirmation of the awards in the Supreme Court of New York in the same cause, Number 16475/1963, under Notice of Petition to Confirm Award pursuant to Section 7510, Civil Practice Laws and Rules, McKinney's Consolidated Laws of New York (Appendix A, A-2, *infra*) and for judgment pursuant to Section 7514(a) of said Rules (Appendix A, A-2, *infra*), said notice being served upon Lester A. Lazarus, attorney for Petitioners, in the arbitration and before the Supreme Court in said cause. The attorney for Petitioners, Lester A. Lazarus, filed his affidavits in opposition dated April 28, 1964 and April 30, 1964 in the proceeding before the Supreme Court of New York, reciting that he was acting as attorney for Petitioners (R. Sec. B, 2nd and 4th Documents in New York Proceedings). Copies of Respondent's Motion to Confirm the Award together with Mr. Lazarus' Affidavits in Opposition thereto containing the affirmation that he is the attorney representing Petitioners were forwarded to Petitioners by letter dated

April 28, 1964 (R. Sec. B, Exhibits 1, 2 and 3 to Sidran dep., Appendix B, B-1 to B-11, *infra*) Judgments reciting that the arbitration proceedings were in all respects regular and that the awards were duly acknowledged and delivered were entered against Petitioners by the Supreme Court of New York. Mr. Lazarus, under date of May 28, 1964, wrote a letter to Petitioners concerning the motion or disposition of the motion to confirm the awards (R. Sec. B, Lazarus Dep., p. 20). Each award and the judgment thereon has not been vacated or modified by order of any court, has not been appealed and is still in full force and effect.

Suit was filed in the 160th Judicial District Court of Dallas County, Texas on said judgments and the 160th Judicial District Court of Dallas County, Texas, granted summary judgment for Respondent (R. Sec. A, p. 80-81), ruling that the judgment of the Supreme Court of New York was entitled to full faith and credit under the laws of the State of Texas. Petitioners appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas which affirmed the trial court (R. Sec. C., pp. 1-6). The Supreme Court of Texas denied Petitioners' Petition for Writ of Error (R. Sec. E, p. 48).

ARGUMENT

At the outset, it is submitted that this case does not involve a fact situation calling for the application of the doctrine of *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877). Petitioners' contention that due process was denied them

and that the New York Courts had no jurisdiction to render an *in personam* judgment on the award of the arbitrators is without merit. Jurisdiction of the Supreme Court of New York may be maintained on several distinct and independent grounds, and there can be no doubt from an examination of the record that due process was not denied Petitioners.

1. Petitioners consented to the jurisdiction of the New York Supreme Court in the contracts which provided for arbitration in New York State.

2. Article 75, Section 7501 CPLR, specifically provided that a written agreement to submit any controversy thereafter arising or an existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and enter judgment on the award.

3. The jurisdiction of the Supreme Court of New York was first invoked by Petitioners, who in the same numbered cause, made a motion to consolidate the arbitration proceedings and for stay.

4. Petitioners initiated, and actively participated in, the arbitration proceedings; Petitioners were served in accordance with the rules of the State of New York.

5. Petitioners had actual notice of the award and proceedings to confirm the award and entered a general appearance in such proceedings.

A.

The award was made pursuant to the provisions of certain contracts, signed by Petitioners which contracts specifically stated that they were "made in the State of New York" and would be "interpreted under and governed by the laws of the State of New York" and further provided in paragraph 16 of each of them that controversies under the contracts would be settled by arbitration in New York and that both parties "consent to the jurisdiction of the Supreme Court of New York". There are numerous cases which have held that such agreements constituted consent to the jurisdiction of the Supreme Court of the State of New York to enforce the contract. Prior to the enactment of the complete statute on arbitration, the New York court stated that an agreement to arbitrate within a given jurisdiction is a submission to the law and the courts of that jurisdiction and that when parties agree to arbitrate in a named jurisdiction they in fact undertake to submit themselves to any procedures in that jurisdiction necessary to bring the arbitration to an effective conclusion *Application of Liberty Country Wear, Inc.*, 96 N.Y.S. 2d 135 (S. Ct., 1950). Later, in *J. Staklinski and Pyramid Electric Company, Respondent*, 180 N.Y.S. 2d 20 (S. Ct. 1958), affirmed 188 N.Y.S. 2d 541, 160 N.E. 2d 78 (Ct. of App., 1959), the New York Court again held that the agreement to arbitrate pursuant to the laws of New York constituted a consent of the parties to the jurisdiction of the Supreme Court of New York to enforce such a contract.

Turning to the current statute, Chapter 75, Section 7501, *et seq.*, *CPLR*, said provision provides as follows:

> "Section 7501 Effect of Arbitration Agreement: A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration *is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the Courts of the state to enforce it and to enter judgment on the award.* In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute." (Emphasis Added)
>
> * * * * *
>
> "Section 7514 Judgment on an Award (a) Entry. A judgment shall be entered upon the confirmation of an award."

Article 75 of the CPLR entitled "Arbitration" consisting of Sections 7501 through 7514 (R., Sec. A, pp. 70-79) is a complete, self contained section dealing with all facets of the special proceeding known as Arbitration under the New York law and covers how such a proceeding is started, how an award is confirmed, vacated or modified and also such post award matters as confirmation of the award and entry of judgment thereon. When Petitioners entered into these written contracts providing for arbitration, they were charged with notice of New York laws pertaining to arbitration and consented to be bound thereby.

B.

The record in this cause indicates that jurisdiction of the Supreme Court of New York was initially invoked in this

cause by Petitioners, acting by and through their attorney Lazarus, who on October 23, 1963 made application for consolidation of the arbitration proceedings since the contract disputes were up until that time being separately arbitrated. (R. Sec. B, Affidavit of Lazarus to Motion to Show Cause, 9th Document New York Proceedings). This application to consolidate the arbitration proceeding was but one step in the entire arbitration proceedings. Respondent resisted the motion to consolidate and for stay but the court ordered the consolidation and the stay requested by Petitioners. Thus, Petitioners, acting by and through their attorney, filed the first application with the Supreme Court of New York, invoking the jurisdiction of said court.

Petitioners then participated actively at the hearing, by and through their attorney, Lazarus, and other personnel, the arbitration being conducted in accordance with applicable statutes of the State of New York. The arbitrators made six separate awards, each of which was unanimous. Respondent then made service of the motion to confirm the award upon Petitioners' attorney, Lazarus, in compliance with Article 7506(d) CPLR, Appendix A, A-2, Rule 2103(b) Appendix A, A-3, *infra*, which provide that if a party is represented by an attorney, papers to be served on the party shall be served upon his attorney. Even though the arbitration clause in the contracts recites that application for judgment on an award "may" be served outside of the State of New York by registered mail or by personal service, this provision is permissive only and did not require Respondent to proceed in this manner since its adversary was represented

by an attorney who, under the arbitration law, could properly be served. Service was made in compliance with New York law. Upon filing of the motion to confirm the awards with the Supreme Court of New York, in the same cause as was instituted by Petitioners, and upon service upon Mr. Lazarus, Mr. Lazarus interposed his affidavits in opposition thereto on the merits in which Lazarus recited under oath that he was the attorney for Petitioners. (See Affidavits contained in New York arbitration proceedings Appendix B, B-1 to B-11, *infra*). Under Rule 320, CPLR, Appendix B, p. B-1 *infra*, an appearance of the Defendant is equivalent to personal service of summons upon him unless at the time of appearance an objection to the jurisdiction is filed. Petitioners' Affidavits in opposition went to the merits and could in no sense of the word be considered an objection to the jurisdiction. In *Aarons v. Local 32-E Building Service Employees International Union*, 82 N.Y.S. 2d 262 (S. Ct., 1948), the New York court stated:

> "* * * In submitting to arbitration, the respondent must be deemed to have put in a general appearance in the special proceeding in which special proceeding the present application is but another step. Respondent has waived any question of jurisdiction."

The motion to confirm the award does not involve the commencement of a new proceeding. When the New York court granted the motion to consolidate the pending arbitration proceedings on Petitioners' application, the jurisdiction of the Supreme Court was not extinguished. All applications in the arbitration proceeding are made in that one proceeding.

This is made abundantly clear by CPLR, Section 7502(a) (Appendix, A, A-2, *infra*,) which states:

> "A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made in a pending action * * * All subsequent applications shall be made by motion in the pending action or the special proceeding."

The first motion was made by the Petitioners, the next application in the same proceeding was Respondent's application to confirm the award. The motion to confirm an arbitration award finalizies the award and is an integral part of the arbitration procedure necessary to protect the interests of the parties *Mossman v. Motor Vehicle Acc. Indemnification Corporation*, 244 N.Y.S. 2d 565 (S. Ct., 1963).

From the foregoing it is submitted that due process has not been violated and the instant case is not in conflict with the teachings of this Honorable Court's holdings in *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877), *International Shoe Company v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1954), and *McGee v. International Life Company*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223. The facts of this case clearly indicate jurisdiction over the person of the Petitioners by their own activities and by their actions and conduct in the proceedings in the sister state of New York.

Lastly, turning to the contention of Petitioners that service was on an unauthorized agent and did not provide Petitioners with adequate or sufficient time to prepare their defense, considering that Petitioners initiated the arbitrations on certain contracts and first invoked the jurisdiction of the New York Courts, the deposition of Mr. Sidran indicates

that when the arbitration was initiated, Mr. Lazarus came to Dallas, talked to Mr. Sidran and Mr. Crocker and that they employed him to represent Petitioners in the arbitration and that Mr. Crocker went to New York on behalf of Petitioners and appeared with Mr. Lazarus on behalf of both Petitioners (R. Sec. B, Sidran Dep., p. 10-11). Further, Mr. Sidran was aware that a Motion to Consolidate the arbitration proceedings had been made in the Court in New York (R. Sec. B, Sidran Dep., p. 12-13). Mr. Sidran was provided with copies of the final award issued by the arbitrators (R. Sec. B, Sidran Dep., p. 15, line 17). Copies of Respondent's Motion to Confirm the Award were forwarded by Mr. Lazarus, enclosing the Motion to Confirm the Award and Petitioners' attorney, Mr. Lazarus', affidavit in opposition thereto containing the affirmation by Mr. Lazarus that he is the attorney representing Petitioners (R. Sec. B, Exhibits 1, 2 and 3 to Sidran Dep., Appendix B, B-1, *infra*). Mr. Lazarus' affidavit even went so far as to assert that "petitioner (Gillsam) had made arrangements and is redelivering the yardage required by the arbitrators to be taken back by the respondent." (Appendix B, B-10, *infra*). Further, Mr. Lazarus wrote a letter under date of May 28, 1964 to Messrs. Sidran, Crocker and Corenbleth concerning the disposition of the awards (R. Sec. B, Lazarus Dep., p. 20). Mr. Lazarus testified that he did not ever receive at any time notice or advice, oral or written, that he was not authorized to accept service of the papers on the Motion to Confirm the Award until he read Mr. Sidran's affidavit in the cause in the 160th Judicial District Court of Dallas County, Texas. In *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed.

2d 62 (1965), this Honorable Court stated that "a fundamental requirement of due process is the opportunity to be heard * * * It is an opportunity which must be granted at a reasonable time and in a meaningful manner." Respondent submits that Petitioners participated throughout, were given an opportunity to be heard at a reasonable time and in a meaningful manner. The lower Texas courts have held in *Baughan v. Goodwin*, 162 S.W. 2d 732 (Tex. Civ. App., writ ref. n.r.e. 1942) quoting with approval Section 451, American Law Institute, Conflicts Restatement, that a party approving and participating in proceedings in a court of any state, will be precluded from questioning the jurisdiction of the court over his person in any subsequent proceedings in that state or any other state, if the court in which he appeared purported to render a judgment against him. In view of the record in this cause, Petitioners have raised no constitutional question and have no grounds for relief before this Honorable Court.

WHEREFORE, for the foregoing reasons, Respondent prays that the Petition for Writ of Certiorari filed on behalf of Petitioners herein be in all things denied.

Respectfully submitted,

G. H. Kelsoe, Jr.

G. H. KELSOE, JR.,
ROBERT M. KENNEDY,
620 Mercantile Dallas Building,
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MARTIN N. WHYMAN,
104 East 40th Street,
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Attorneys for Respondent.

PROOF OF SERVICE

I, G. H. Kelsoe, Jr., attorney for Tanenbaum Textile Company, Inc.; herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of February, 1967, I served copies of the foregoing Brief for Respondent, by mailing copies in duly addressed envelopes, with first class postage prepaid, to the following attorney of record for Petitioner.

Harold B. Berman
1831 Republic National Bank Bldg.
Dallas, Texas 75201

The person on whom service is to be made does not reside five hundred miles or more from me.

G. H. Kelsoe, Jr.

G. H. KELSOE, JR.,
Attorney for Respondent,
620 Mercantile Dallas Building,
Dallas, Texas 75201.

APPENDIX A

The pertinent provisions of the Constitution of the United States are as follows:

> Section 1 of the 14th Amendment to the Constitution of the United States
>
> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> Section 1, Article IV of the Constitution of the United States
>
> "Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

The pertinent provisions of the New York CPLR (Civil Practice Law and Rules) are as follows:

> "Sec. 7501. Effect of arbitration agreement. A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute." (R., Sec. A, p. 71)

"Sec. 7502. Applications to the court; venue; statutes of limitation.

(a) Applications to the court; venue. A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action. The proceeding shall be brought in the court and county specified in the agreement; or, if none be specified, in a court in the county in which one of the parties resides or is doing business, or, if there is no such county, in a court in any county; or in a court in the county in which the arbitration was held. All subsequent applications shall be made by motion in the pending action or the special proceeding." (R., Sec. A, p. 71)

"Sec. 7506. Hearing.

(d) Representation by attorney. A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party shall be served upon his attorney." (R., Sec. A, p. 74)

"Sec. 7510. Confirmation of award.

The court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511."
(R., Sec. A, p. 76)

"Sec. 7514. Judgment on an award.

(a) Entry. A judgment shall be entered upon the confirmation of an award." (R., Sec. A., p. 79)

"Rule 320. Defendant's appearance

(a) Requirement of an appearance. The Defendant appears by serving an answer or a notice of appear-

ance, or by making a motion which has the effect of extending the time to answer. * * *

(b) Where appearance confers personal jurisdiction generally. Subject to the provisions of subdivision (c), an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted at the time of appearance by motion or in the answer." (R., Sec. A, p. 20)

"Rule 2103. Service of papers.

(b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon his attorney. * * *"' (R., Sec. A, p. 21)

APPENDIX B

Quoted hereinafter is the letter of Mr. Lester A. Lazarus, Petitioners' attorney, to Petitioners, with copies of Mr. Whyman's Application to Confirm the Award in the Supreme Court of New York and Mr. Lazarus' "corrective affidavit" submitted in response thereto in which Mr. Lazarus indicates he is Petitioners' attorney (R., Sec. B, Exhibits 1; 2 and 3 to Sidran Deposition).

PX-1 3-5-65

SCHEIN & LAZARUS
COUNSELORS AT LAW

HARRY L. SCHEIN
LESTER A. LAZARUS

MURRAY HILL 3-0587

LEONARD H. CARTER
TAX COUNSEL

22 EAST 40TH STREET
(275 MADISON AVENUE)
NEW YORK 10, N. Y.

OREGON 9-9494

CABLE ADDRESS
CORPTAXLAW

April 28, 1964

Mr. Joseph Sidran
2030 N. Field Street
Dallas, Texas

RE. TANENBAUM

Dear Joe:

Enclosed please find Mr. Whyman's application to confirm the award, together with my corrective affidavit.

Cordially,

/s/ LESTER A. LAZARUS

LESTER A. LAZARUS

LAL: jcm
Enclosures

CC: Mr. Rad L. Crocker

B-2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Consolidation of
Arbitration Proceedings Between

BROWNWOOD MANUFACTURING CO.,
GILLSAM MANUFACTURING CO., INC.,
SIDRAN SPORTSWEAR, INC.,

Petitioners,

and

TANENBAUM TEXTILE CO., INC.,

Respondent.

Petition to Confirm Awards of Arbitrators
Index #16475/1963

The petition of Tanenbaum Textile Co., Inc. respectfully shows to this Court and alleges:

1. At all times hereinafter mentioned, Tanenbaum Textile Co., Inc. was and still is a domestic corporation organized and existing under the Laws of the State of New York with principal offices at No. 468 Park Avenue South, New York City, New York.

2. At all times hereinafter mentioned, Brownwood Manufacturing Co., Gillsam Manufacturing Co., Inc. and Sidran Sportswear, Inc. were and each still are corporations created by and existing under the laws of the State of Texas and each having principal offices in Brownwood, Texas, Dublin, Texas, and Dallas, Texas, respectively.

3. There is hereinafter set forth in tabular form, the agreements entered into between the parties, indicating separately the date of the agreement, the names of the parties between whom the same was entered into and the number of the agreement.

Date	*Parties*	*Contract No.*
3-23-62	Brownwood Manufacturing Co. Tanenbaum Textile Co., Inc.	3260
3-23-62	Brownwood Manufacturing Co. Tanenbaum Textile Co., Inc.	3261
10-22-52	Brownwood Manufacturing Co. Tanenbaum Textile Co., Inc.	3315
12-26-62	Brownwood Manufacturing Co. Tanenbaum Textile Co., Inc.	3349
12-26-62	Brownwood Manufacturing Co. Tanenbaum Textile Co., Inc.	3240
10- 5-62	Brownwood Manufacturing Co. Tanenbaum Textile Co., Inc.	3310
11-20-62	Brownwood Manufacturing Co. Tanenbaum Textile Co., Inc.	3336
3- 6-62	Gillsam Manufacturing Co., Inc. Tanenbaum Textile Co., Inc.	3255
1-26-62	Sidran Sportswear, Inc. Tanenbaum Textile Co., Inc.	3248
7-27-62	Gillsam Manufacturing Co., Inc. Tanenbaum Textile Co., Inc.	3290

Each of said agreements contains the following provision:

"16. ARBITRATION: Any controversy relating to this contract shall be settled by arbitration. Arbitration shall be held in the city of New York in accordance with the rules then obtaining of the General Arbitration Council of the Textile Industry. Buyer and

Seller consent to the jurisdiction of the Supreme Court of the State of New York and further consent that any process or notice of motion or any application to the Court, including application for judgment upon an award, may be served outside the State of New York by registered mail or by personal service provided a reasonable time for appearance is allowed."

There is attached hereto and made a part hereof a copy of each of said agreements.

4. There is hereinafter set forth in tabular form the dates on which arbitration proceeds were instituted by the respective parties against each other before General Arbitration Council of the Textile Industry indicating separately the date on which such proceedings were instituted, the number of the contract in connection with which such proceedings were instituted, the name of the party by whom such proceedings were instituted and the name of the party against whom such proceedings were instituted.

Date of Commencement of Proceeding	*Contract No.*	*Instituting Party*	*Adverse Party*
7-26-63	3260	Tanenbaum	Brownwood
8- 5-63	3349	Tanenbaum	Brownwood
8- 7-63	3242	Brownwood	Tanenbaum
	3310		
	3336		
9-30-63	3255	Tanenbaum	Gillsam
10- 7-63	3261	Brownwood	Tanenbaum
10- 7-63	3249	Tanenbaum	Sidran
10- 7-63	3290	Gillsam	Tanenbaum

Each of said proceedings was duly and properly commenced in accordance with the rules then obtaining of the

General Arbitration Council of the Textile Industry. Thereafter, and by order to show cause dated October 22, 1963, the petitioners above named applied to this Court for an order consolidating all of the aforesaid arbitration proceedings and said application came on to be heard before Mr. Justice Owen McGivern at Special Term, Part I of this Court and under date of December 2, 1963 an order was entered by Mr. Justice McGivern granting the application to consolidate and directing that the General Arbitration Council of the Textile Industry proceed to bring on said arbitration proceeding for hearing and to provide, pursuant to its rules and regulations, a panel of three arbitrators to hear said consolidated arbitration proceedings. A copy of said order is annexed hereto and made a part hereof.

5. In pursuance of the foregoing order of consolidation and in accordance with the rules and regulations of the General Arbitration Council of the Textile Industry, arbitrators were selected, namely Messrs. Howell R. Geib, Jr., Oscar J. Groebl and Eric Stern, and a hearing date set for the consolidated arbitration proceeding, namely April 13, 1964.

6. On April 13, 1964, the parties, their witnesses and their counsel, attended at the General Arbitration Council of the Textile Industry, at 11 West 42nd Street, New York, New York, and the arbitrators having first subscribed and sworn to their respective oaths of office required by Section 7506 (a) CPLR the matter proceeded to hearing before the arbitrators on April 13, 1964, April 14, 1964 and April 15, 1964, on which dates the parties presented their testimony and proofs in support of their respective contentions.

7. On April 15, 1964, April 16, 1964 and April 17, 1964, the arbitrators made six separate awards in the consolidated arbitration proceedings, each of which was unanimous and each of which was signed and acknowledged by all of the arbitrators and each of which was delivered to the attorneys for the respective parties to the consolidated arbitration proceedings. A copy of each of the said awards is annexed hereto and made a part hereof.

8. Each of said awards has not been vacated or modified by order of any Court of competent jurisdiction and is still in full force and effect.

9. There is hereinafter set forth in tabular form the facts as to the amount of the awards rendered by the arbitrators in each of the aforesaid arbitration proceedings, confirmation of which is herein sought, indicating under separate columnar heading the name of the firm against which the said award was rendered in favor of Tanenbaum Textile Co., Inc., the arbitration number of each such proceeding, the amount of the award rendered, the amount of the interest awarded, the amount of the arbitration costs awarded and the total amount for which judgment is sought.

Name of firm against whom award rendered	*Arbitration # of Proceeding*	*Amount of Award*	*Interest*	*Arbitration Costs*	*Amount for which judgment sought*
Brownwood	AC63-84 AC68-109	$8,475.03	$508.50	$203.01	$9,186.54
Brownwood	AC63-86	8,327.16	512.96	303.77	9,143.89
Brownwood	AC63-89	20,322.70	1,119.36	—	21,542.06
Gillsam	AC63-100	38,655.40	1,417.37	489.35	40,562.12

10. Pursuant to the said awards, the firms obligated to make payments thereunder are directed to make such payment to Tanenbaum Textile Co., Inc. within ten (10) days from the date of each of said awards, which are dated April 15th, 16th and 17th, respectively, and the last day to make any payment will expire on April 27, 1964. This application for confirmation of the awards and for the entry of judgment is made returnable as of a date subsequent to April 27, 1964 and if any payment is made prior to the date of the entry of any order herein or any judgment herein, then appropriate credit for such payment will be given upon the judgment sought to be entered herein.

WHEREFORE, Tanenbaum Textile Co., Inc. respectfully requests that an order be granted confirming each of said awards and directing that judgment be entered thereon in favor of Tanenbaum Textile Co., Inc. and against Brownwood Manufacturing Co., Gillsam Manufacturing Co., Inc. and Sidran Sportswear, Inc. in accordance with each of said awards and that Tanenbaum Textile Co., Inc. be allowed the costs and disbursements of this proceeding, together with such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 23, 1964

MARTIN N. WHYMAN,
Attorney for Tanenbaum Textile Co., Inc.
Office and P. O. Address
104 East 40th Street
New York, New York 10016

STATE OF NEW YORK
CITY OF NEW YORK } SS.:
COUNTY OF NEW YORK

LAWRENCE TANENBAUM, being duly sworn, deposes and says that he is the President of TANENBAUM TEXTILE CO, INC., the corporation named in the within entitled action; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged on information and belief, and as to those matters, he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the within corporation, is because the said Tanenbaum Textile Co., Inc., is a domestic corporation and deponent an officer thereof, to wits its President.

Sworn to before me this
23rd day of April, 1964.

.....
Lawrence Tanenbaum

MARTIN N. WHYMAN
No. 30-965370
Notary Public, State of New York
Qualified in Nassau County
Term Expires March 30, 1966

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Consolidation of
Arbitration Proceedings between

BROWNWOOD MANUFACTURING CO.,
GILLSAM MANUFACTURING CO., INC.,
SIDRAN SPORTSWEAR, INC.,

Petitioners,

and

TANENBAUM TEXTILE CO., INC.,

Respondent.

16475/1963

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

LESTER A. LAZARUS, being duly sworn, deposes and says that:

I am the attorney for the abovenamed petitioners, and am fully familiar with all the facts herein, having participated in and conducted the arbitration proceedings, the awards in which are the subject of this application to confirm.

Petitioners just wish to point out to the Court so that all of the facts are before it the following:

1. BROWNWOOD (A.C. 63-84 and 63-109).

The Respondent seeks to confirm a total award in the sum of $9,186.54. The total amount sought by the respond-

ent in the arbitration proceeding was $15,457.65, so that in effect the arbitrators reduced the amount sought by the respondent in the sum of $6,271.11.

2. BROWNWOOD (A.C. 63-86).

The respondent seeks to confirm an award in the total amount of $9,143.89. In this proceeding, at the arbitration hearing, the petitioners conceded that the amount was due.

3. BROWNWOOD (A.C. 63-89).

The respondent seeks to confirm an award in the total amount of $21,542.06. This award represents only a part of the total amount sought to be recovered by respondent. Respondent actually sought to recover a total amount of $23,338.73, so that the arbitrators deducted from the amount sought to be recovered the sum of $1,796.67.

4. GILLSAM (A.C. 63-100)

In this proceeding, the respondent sought to recover of this petitioner the total sum of $58,804.70.

The award which is attached to the moving papers requires that this petitioner pay to respondent the sum of $36,074.15, not the sum of $38,655.40, as set forth in the moving papers. This petitioner has made arrangements and is re-delivering the yardage required by the arbitrators to be taken back by the respondent.

In addition, the interest figure set forth by the respondent of $1,417.37 is inaccurate. That figure should be $1,262.59.

Therefore, in this proceeding, the arbitrators awarded the respondent $20,467.95 less than the respondent sought to recover from this petitioner.

In other words, the arbitrators awarded the respondent $28,535.74 less than it sought to recover from the petitioner firms.

WHEREFORE it is respectfully requested that the records be corrected accordingly.

.....

Lester A. Lazarus

Sworn to before me this
28 day of April, 1964.

.....